(1)

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1994

D.G.,

Petitioner,

v.

T.M.N., ADOPTIVE PARENTS and CATHOLIC SOCIAL SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The Kansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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JOHN C. NODGAARD
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60 pp

A. QUESTION PRESENTED FOR REVIEW

Does Kan. Stat. 59-2136(h)(4) and (5) violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, by providing for termination of parental rights based on conduct which predates the establishment of the parent-child relationship under Kansas law.

---

[1] Pursuant to Supreme Court Rule 21, the natural mother (TMN) and the adoptive parents are parties. The natural mother is represented by Martin W. Bauer and the adoptive parents by Don W. Riley, both of Wichita, Kansas, and on whom this petition is being served. Pursuant to Kansas Supreme Court rules, the actual names are to be kept confidential and petitioner is desirous of keeping such names of such parties confidential. Catholic Social Services is also a party represented by Martin W. Bauer. Baby Boy N. is also a party.

[2] Pursuant to Supreme Court Rule 28.4(c), 28 U.S.C. § 2403(b) may be applicable as the constitutionality of a Kansas Statute is drawn into question.

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No. _____

In The

Supreme Court of the United States

October Term, 1994

IN RE THE INTEREST OF BABY BOY N.
IN RE THE ADOPTION OF BABY BOY N.

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

D. OPINIONS OF COURTS BELOW

1. *In Re Baby Boy N.*, Kansas Advance Sheets, Volume 255, No. 3, P. (VII) (1994)

2. *In re Baby Boy N.*, 19 Kan. Ap. 2d 574, ___ P.2d, ___ (1994)

3. In the Interest of Baby Boy N. (Sedgwick County, Kansas District Court Journal Entry (Filed March 26, 1993)), Case No. 92 A 322.

E. JURISDICTION

The Kansas Supreme Court issued its opinion July 7, 1994. Jurisdiction is conferred on this court by 28 U.S.C. §1257.

F. STATUTES INVOLVED

1. Kan. Stat. 59-2136. Relinquishment and adoption; proceedings to terminate parental rights.

(a) The provisions of this section shall apply where a relinquishment or consent to an adoption has not been obtained from a parent and K.S.A. 59-2124 and 59-2129, and amendments thereto, state that the necessity of a parent's relinquishment or consent can be determined under this section.

. . .

(h) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act. If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following:

(1) The father abandoned or neglected the child after having knowledge of the child's birth;

(2) the father is unfit as a parent or incapable of giving consent;

(3) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;

(4) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;

(5) the father abandoned the mother after having knowledge of the pregnancy;

(6) the birth of the child was the result of rape of the mother; or

(7) the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of this subsection, the court may disregard incidental visitations, contacts, communications or contributions. In determining whether the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption, there shall be a rebuttable presumption that if the father, after having knowledge of the child's birth, has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent.

2. Kan. Stat. 59-2124. Relinquishment of child to agency.

(a) Any parent or parents or person in loco parentis may relinquish a child to an agency, and if the agency accepts the relinquishment in writing, the agency shall stand in loco parentis to the child and shall have and possess over the child all rights of a parent or legal guardian, including the power to place the child for adoption and give consent thereto.

(b) All relinquishments to an agency under K.S.A. 59-2111 through 59-2143, and

amendments thereto, shall be in writing, in substantial conformity with the form for relinquishment contained in the appendix of forms following K.S.A. 59-2143, and amendments thereto, and shall be executed by: (1) Both parents of the child; (2) one parent, if the other parent is deceased or the other parent's relinquishment is found unnecessary under K.S.A. 59-2136, and amendments thereto; or (3) a person in loco parentis.

(c) The relinquishment shall be in writing and shall be acknowledged before an officer authorized by law to take acknowledgements. If the relinquishment is acknowledged before a judge of a court of record, it shall be the duty of the court to advise the relinquishing person of the consequences of the relinquishment.

(d) Except as otherwise provided, in all cases where a parent or person in loco parentis has relinquished a child to the agency pursuant to K.S.A. 59-2111 through 59-2143, and amendments thereto, all the rights of the parent or person in loco parentis shall be terminated, including the right to receive notice in a subsequent adoption proceeding involving the child. If a parent has relinquished a child to the agency pursuant to K.S.A. 59-2111 through 59-2143, and amendments thereto, based on a belief that the child's other parent would relinquish the child to the agency, and such other parent does not relinquish such child to the agency, the rights of such parent who has relinquished a child to the agency shall not be terminated. Upon such relinquishment, all the rights of birth parents to such child, including their right to inherit from or through such child, shall cease.

(e) A parent's relinquishment of a child shall not terminate the right of the child to inherit from or through such parent.

3. Kan. Stat. 59-2129. Consent. (a) Consent to an independent adoption shall be given by:

(1) The living parents of the child; or

(2) One of the parents of the child, if the other's consent is found unnecessary under K.S.A. 59-2136; or

(3) the legal guardian of the child, if both parents are dead or if their consent is found to be unnecessary under K.S.A. 59-2136, or

(4) the court entering an order under subsection (c)(1)(B) of K.S.A. 38-1584 and amendments thereto; and

(5) the judge of any court having jurisdiction over the child pursuant to the code for care of children, if parental rights have not been terminated; and

(6) the child sought to be adopted, if over 14 years of age and of sound intellect.

(b) Consent to an agency adoption shall be given by:

(1) The authorized representative of the agency having authority to consent to the adoption of the child; and

(2) the child sought to be adopted, if over 14 years of age and of sound intellect.

(c) The provisions of subsection (a) shall apply to consent in a stepparent adoption, except that subsections (a)(3) and (4) shall not apply.

(d) A consent given by a parent, legal guardian or agency shall be in substantial conformity with the form for consent contained in the appendix of forms following K.S.A. 59-2143.

(e) A consent given by a legal guardian, judge or agency shall set forth the authority to execute the consent and shall be accompanied by documents supporting that authority.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14. – RIGHTS AND IMMUNITIES OF CITIZENS

Sec. 1. **Citizenship; privileges or immunities; due process clause.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

G. STATEMENT OF THE CASE

Introduction

The natural mother (hereinafter "Mother") filed a petition to sever the natural father's (hereinafter "Father") parental rights to Baby Boy N. under Kan. Stat. Supp. 59-2136(h) thereby permitting an adoption of Baby

Boy N. by third parties. The Sedgwick County Kansas District Court, (hereinafter "trial court") after hearing the evidence applied Kan. Stat. 59-2135(h)(4) and (5) and terminated the natural father's parental rights. After Father filed his Notice of Appeal to the Kansas Court of Appeals, the trial court heard evidence and granted an adoption of Baby Boy N. by third parties. Father appealed the Adoption decree to the Kansas Court of Appeals where the two appeals were consolidated. The Kansas Court of Appeals affirmed the trial court ruling terminating Father's parental rights, but set aside the adoption on procedural grounds. Father's petition for review to the Kansas Supreme Court was denied.

The federal question was first raised in the Kansas Court of Appeals and was raised in the appellant's brief. The Kansas Court of Appeals held that "we could not intelligently decide the merits of this action without dealing with the claim that the portion of the statute cited above is unconstitutional." 19 Kan.App.2d at p. 579.

Background

From the time Father was informed that Mother was pregnant, on March 22, 1992, the parties disagreed over the future of their unborn child. The Mother wanted to place the child for adoption, and Father at all times wanted to keep the child. Father offered to marry Mother, but Mother declined. Although disputed by Father, the trial court found Father terminated his relationship with mother on April 20, 1992. Mother wrote Father a letter in which she stated she would disappear if he did not consent to the adoption. Again disputed by Father, the

trial court found that Father provided Mother with no support, financial or otherwise during the six months prior to birth of Baby Boy N. Father sought legal advice as to what legal steps could be taken to prevent the adoption of the child. He was told there was nothing he could do until the child was born. Father began saving money to take care of the child after its birth. Mother filed her relinquishment with the court indicating that she did not know who the father was or where he could be located, when if fact she knew the same. Father's parental rights were then terminated by the trial court without actual notice to him. Father found out shortly thereafter and filed a petition to set the order aside. The order was set aside and the trial court set the matter for evidentiary hearing. Father refused to give his consent to an adoption. The trial court, after hearing evidence, terminated Father's parental rights.

H. REASONS FOR GRANTING THE WRIT

The Decision of the Kansas Supreme Court herein conflicts with the Due Process Clause of the United States Constitution. Application of Kan. Stat. 59-2136(h)(4) and (5) deprives the natural father of his parental rights without a finding of unfitness. The Father in the case at bar was not found unfit. He continues to stand ready to assume parental responsibilities.

A review of the United States Supreme Court cases will illustrate that fitness of the natural father should always be the standard, and that, in those cases where the

standard is less, the factual circumstances are not analogous to that of the case at bar.

The Kansas Court of Appeals as affirmed by the Kansas Supreme Court states that the landmark decision of *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), which found unconstitutional a statutory scheme automatically making illegitimate children wards of the state upon the mother's death, was narrowly decided based upon the fact that the unwed father had lived with and supported the children all their lives. This is clearly incorrect. *Stanley's* holding was that a determination of unfitness of the unwed father must occur before he can be deprived of his children. "We have concluded that ***all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.***" *Stanley v. Illinois*, supra, at p. 658. (Emphasis added).

The Kansas Court of Appeals then went on to examine the United States Supreme Court decision of *Quilloin v. Walcott*, 434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549, *reh. denied*, 435 U.S. 918 (1978), which was narrowly decided on the facts. In *Quilloin*, the illegitimate child was 12 years old, the unwed father did not seek custody, and this was a step-parent adoption. Because of these facts, the Georgia statute allowing the state permission to give the unwed father less veto authority in an adoption proceeding was upheld. The court stated:

> "We have little doubt that the Due Process Clause would be offended [i]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and

> for the sole reason that to do so was thought to be in the children's best interest. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, 53 L.Ed.2d 14, 97 S.Ct. 2094 (1977) (Stewart, J., concurring in judgment).
>
> But this is not a case in which the unwed father at any time had, or sought actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the state was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the 'best interest of the child'." *Quilloin v. Walcott*, 434 U.S. at 255.

Here, the Father did seek custody of his child, and the child was going to be placed with a *new* set of parents. Further, the result of this adoption was not to give full recognition to a family unit already in existence. Because of K.S.A. Supp. 59-2136(h)(4) and (5), which allow the termination of parental rights – based on a parent's conduct *before* a child is born, (and before the parent-child relationship established – See *In Re Nelson*, 202 Kan. 666, 451 P.2d 663 (1969) – parent/child relationship established at birth of child), we can never ascertain whether Father would have provided support, both emotional and physical, to his child. *Quilloin* involved a 12 year old child and it was therefore quite easy to measure the

support given to his child over the years. Father here will never have that chance.

The Court of Appeals also looks to *Caban v. Mohammed*, 441 U.S. 380, 60 L.Ed.2d 297, 99 S.Ct. 1760 (1979) to justify its decision in this case. It is interesting to note that *Caban* found the New York statute in question unconstitutional. The Court of Appeals stated with regard to the decision in *Caban*, "[t]he court also intimated that a different result might be reached in a case where, factually, the natural father had never come forward to participate in the rearing of *the child.*" (See Appendix "A" p. 1b) (Emphasis added). Again, *Caban* dealt with a 4 and a 6 year old, so the court could easily measure the amount of support the unwed father provided. The Kansas statute, in particular, parts (4) and (5), do not allow the court to measure the amount of support given to *the child* because the statute operates to terminate the unwed father's rights based on conduct before the child's birth.

Last in the line of United States Supreme court cases, is *Lehr v. Robertson*, 463 U.S. 248, 77 L.Ed.2d 614, 103 S.Ct. 2985 (1983). This case upheld the constitutionality of a New York statute which required an unwed father to register with a putative father registry in order to receive notice of a pending adoption. The court only decided the issue of the constitutionality of the notice requirement, not the father's due process claim which we are asking the Court to consider in this case. As the Court of Appeals correctly quotes from *Lehr*:

> "The significance of the biological connection is that it offers the natural father an opportunity

> that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." 730 U.S. at pp. 261-262.

The court in *Lehr* further noted that the father failed to provide any support for the child and did not seek a relationship with the child until she was 2 years old. The court stated, "As we have already explained, the existence or nonexistence of a substantial relationship between parent *and child* is a relevant criterion in evaluating both the rights of the parent and the best interests of the child." 463 U.S. at pp. 267-268. (Emphasis added). Further, in a well reasoned dissenting opinion in *Lehr* in which three Justices joined, it was revealed that the mother did much to sabotage the father's relationship with his child. The dissenting opinion states, " . . . [t]hat but for the actions of the child's mother, there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protection." Id. at p. 271.

Again, Father was not provided the opportunity to develop a relationship with his offspring under Kansas's statutory scheme, despite his immediate attempts to do so after learning of the birth of the child. He cannot ever grasp the opportunity and accept some measure of responsibility for his child's future because the Kansas

statute operates to cut off his right to his child before it is even born. We cannot measure the substantial relationship between Father and *his child* as the court in *Lehr* directs because Father will never be given an opportunity to establish a relationship under the Kansas statute. If not for K.S.A. Supp. 59-2136(4) and (5), he would have had the opportunity. Indeed, under any other subsection of K.S.A. 59-2136, Father's parental rights could not have been terminated absent a lack of support for the child *after its birth.* The evidence at the trial court level showed that Father offered to marry Mother after learning of the pregnancy. She refused. The Mother deliberately lied to Catholic Social Services about the identity of Father because she knew he would never consent to an adoption of his child. Mother threatened to leave with the child if he did not cooperate in the adoption. And finally, Father sought legal advice from Wichita Legal Services as to his rights to his child but was told there was nothing he could do until *after its birth.* There was also testimony that Father was saving his money to support the child *after its birth.* As in *Lehr,* Mother did much to sabotage Father's efforts to establish a relationship with his child. Therefore, Father should be entitled to the full panoply of due process protection. He is a fit parent and stands ready to assume his parental responsibilities. He is entitled to exercise his parental relationship with his son.

I. CONCLUSION

For the foregoing reasons, we respectfully request that this Petition for Writ of Certiorari be granted and that the decision of the Court below be reversed.

Respectfully submitted,

STUART R. COLLIER
ROGER K. WILSON
JOHN C. NODGAARD
MILO M. UNRUH, JR.
KRIS J. KUHN
JENNIFER A. WAGLE
KIM CHRISTIANSEN
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SUPREME COURT ORDER DISTRICT CASE NO. 92A322

IN THE SUPREME COURT

OF THE STATE OF KANSAS

STUART R COLLIER
ARN MULLINS UNRUH KUHN & WILSON
300 W DOUGLAS SUITE 330
WICHITA KS 67202-2978

IN THE INTEREST OF
BABY BOY N.
BORN 11/07/92

NO. 93-69705-AS

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY NATURAL FATHER.

DENIED.

CONSOLIDATED WITH 70398 ON 10/20/93

DATE: 07/07/94.

CAROL G. GREEN
CLERK

Nos. 69,705
70,398

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

In the Interest of
BABY BOY N.,

and

In the Matter of the Adoption of
BABY BOY N.

SYLLABUS BY THE COURT

1.

The relinquishment of a child to an agency for adoption must be accepted in writing by that agency in order to be effective.

2.

K.S.A. 1993 Supp. 59-2136(h)(4) and (5) are constitutional and do not violate the due process rights of a natural father or his right to equal protection under the law.

3.

The "parental preference" doctrine, as enunciated by the Supreme Court of Kansas, does not apply in cases in which parental rights are terminated under the provisions of K.S.A. 1993 Supp. 59-2136(h).

4.

A natural father's parental rights may be terminated under the procedure set forth in K.S.A. 1993 Sup.

59-2136(h) even though he is not found to be unfit. A termination of parental rights pursuant to K.S.A. 1993 Supp. 69-2136(h) is not an unconstitutional violation of the parental preference doctrine.

5.

In the event a natural father fails to provide support for the child's mother for six months preceding the child's birth, his parental rights should not be terminated if his reasonable efforts to provide support failed because of the interference by the mother, adoption agency, or adoptive parents.

6.

The question of whether a natural father has failed, without reasonable cause, to provide support for the mother during the six months prior to the child's birth is a question of fact to be determined by the trial court after considering all of the relevant surrounding circumstances.

7.

Under K.S.A. 59-2407, the operation of an order terminating parental rights is suspended when a notice of appeal is filed appealing that order.

8.

While the operation of an order terminating parental rights is in suspension under K.S.A. 59-2407, the trial court is without jurisdiction to enter an adoption decree without the consent of both parents of the child.

Appeal from Sedgwick District Court; HAL MALONE, Judge. Opinion filed May 13, 1994. Affirmed in part, vacated in part, and remanded.

Stuart R. Collier, of Arn, Mullins, Unruh, Kuhn & Wilson, of Wichita, for appellant natural father.

Martin W. Bauer, of Martin, Pringle, Oliver, Wallace & Swartz, of Wichita, for appellee Catholic Social Services.

Before ROYSE, P.J., LEWIS and PIERRON, JJ.

LEWIS, J.: D.G. and T.M.N. are the natural father and mother of Baby Boy N., who was born November 7, 1992. D.G. and T.M.N. have never been married. This litigation concerns the adoption of Baby Boy N. with the consent of his mother and over the objections of his father. D.G. is the appellant. The appellee is Catholic Social Services (CSS), which represents the interests of T.M.N. and of the adoptive parents. We affirm in part, vacate in part, and remand.

From the time D.G. was informed that T.M.N. was pregnant, the parties disagreed over the future of their unborn child. T.M.N. wanted to place the child for adoption, and D.G. wanted to keep the child. That disagreement has culminated in this appeal.

In this case, some specific dates are important. On March 2, 1992, T.M.N. advised D.G. that she was pregnant with his child. On April 20, 1992, D.G. terminated his relationship with T.M.N. It is undisputed that, during the six months preceding the birth of Baby Boy N., D.g. provided T.M.N. with no support, financial or otherwise. The justification offered by D.G. for his nonsupport will be dealt with later in this opinion.

D.G. refused to give his consent for an adoption. Accordingly, a petition was filed to sever his parental rights under K.S.A. 1993 Supp. 59-2136(h). The trial court, after hearing the evidence, concluded that D.G. had failed to support T.M.N. in the six months preceding the birth of Baby Boy N. and that he had abandoned her after learning of the pregnancy. The trial court then terminated the parental rights of D.G. under the statute. D.G. appeals from that order of termination.

After D.G. had filed his notice of appeal from the order terminating his parental rights, the trial court continued the litigation and heard evidence on the adoption. The trial court entered an adoption decree without the consent of D.G., in reliance upon the termination of his parental rights by the earlier order. D.G. filed a second notice of appeal from the adoption decree. These two appeals have been consolidated.

D.G. raises several issues, and further facts will be developed as necessary in dealing with those issues.

STANDING OF NATURAL MOTHER AND ADOPTION AGENCY

D.G. contends that neither T.M.N. nor CSS had standing to file the petition for termination of his parental rights.

The original petition to terminate D.G.'s parental rights was filed by CSS. On a later date, an amended petition to terminate parental rights was filed by CSS and T.M.N. K.S.A. 1993 Supp. 59-2136(e) provides: "The petition may be filed by the mother, the petitioner for adoption, the person or agency having custody of the child or

the agency to which the child has been or is to be relinquished."

D.G.'s argument on this issue is based on two relinquishment forms signed by T.M.N. The first form attempted to relinquish the parental rights of T.M.N. to CSS. This form was filed the day Baby Boy N. was born. CSS never accepted that relinquishment in writing. T.M.N. then signed a second relinquishment form. This relinquishment was conditional to the extent that it only was to become effective if D.G.'s parental rights were terminated. If his parental rights were not terminated, the relinquishment was null and void and T.M.N. retained all parental rights. CSS did accept this relinquishment in writing but did so conditionally on termination of the rights of D.G.

D.G. argues that the first form signed by T.M.N. did not give CSS standing because it was not accepted in writing. He then argues that the second relinquishment was ineffective because, by this point, T.M.N. had no rights left to relinquish. He suggests that the first relinquishment forfeited all of T.M.N.'s parental rights and she had no rights to relinquish by the time the second form was signed. CSS, he says, gained no standing by the second relinquishment because it was a nullity and conditionally accepted. We disagree with D.G.'s argument.

K.S.A. 1993 Supp. 59-2124 reads in pertinent part as follows:

> "(a) Any parent or parents or person *in loco parentis* may relinquish a child to an agency, and if the agency accepts the relinquishment in writing, the agency shall stand *in loco parentis* to

> the child and shall have and possess over the child all rights of a parent or legal guardian, including the power to place the child for adoption and give consent thereto.
>
> "(b) all relinquishments to an agency under K.S.A. 59-2111 through 59-2143, and amendments thereto, shall be in writing, in substantial conformity with the form for relinquishment contained in the appendix of forms following K.S.A. 59-2143, and amendments thereto, and shall be executed by: (1) Both parents of the child; (2) one parent, if the other parent is deceased or the other parent's relinquishment is found unnecessary under K.S.A. 59-2136, and amendments thereto; or (3) a person *in loco parentis*."

As we read the statute, neither relinquishment was effective. The first relinquishment signed by T.M.N. was never accepted in writing as required by 59-2124(a). The second relinquishment was only conditionally accepted by CSS, and we find nothing in the statute authorizing a conditional acceptance. If neither relinquishment was effective, T.M.N. was left in the same position as if she had never signed them. T.M.N. had standing to sign the second amended petition. Her signature is the only one required.

K.S.A. 1993 Supp. 59-2124 is a statute which authorizes divestiture of parents' rights, and it must be strictly construed in favor of maintaining those rights. *Wilson v. Kansas Children's Home*, 159 Kan. 325, 329-30, 154 P.2d 137 (1944). *Wilson* dealt with G.S. 1935, 38-113, a statute similar to the one now under consideration. That statute authorized relinquishment of parental rights if the form

was executed by the parent and accepted by the agency. In *Wilson*, the mother signed the relinquishment form, but there was no evidence that custody or control of the child was ever accepted by the adoption home or agency. The mother filed a writ of habeas corpus, seeking custody of her children, and it was granted since her relinquishment of those children had ever been accepted as required by law.

In the instant matter, neither relinquishment executed by T.M.N. was properly accepted and neither document divested the mother of her natural rights.

K.S.A. 1993 Supp. 59-2136(e) provides: "The petition may be filed by the mother, the petitioner for adoption, the person or agency having custody of the child *or the agency to which the child has been or is to be relinquished.*" (Emphasis added.) It is clear under these facts that CSS was an agency to which the child had been or was to be relinquished and, as such, it also had standing to file the second petition for termination of parental rights under 59-2136(e).

We conclude that D.G.'s argument on standing is without merit.

CONSTITUTIONALITY OF K.S.A. 1993 SUPP. 59-2136(h)(4) AND (5)

D.G. asserts, for the first time on appeal, that K.S.A. 1993 Supp. 59-2136(h)(4) and (5) are unconstitutional. The subsection in question reads as follows:

> "(h) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant

to the Kansas parentage act. If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following:

(1) The father abandoned or neglected the child after having knowledge of the child's birth;

(2) the father is unfit as a parent or incapable of giving consent;

(3) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;

(4) *the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;*

(5) *the father abandoned the mother after having knowledge of the pregnancy;*

(6) the birth of the child was the result of rape of the mother; or

(7) the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition." (Emphasis added.)

The emphasized portions of the statute are those under attack.

D.G. bases his argument on the fact that the trial court did not find that he was an unfit parent and still

terminated his parental rights. He submits that the termination of his parental rights without finding him unfit is unconstitutional and violates the parental fitness doctrine announced by the Kansas Supreme Court in *Sheppard v. Sheppard,* 230 Kan. 146, 630 P.2d 1121 (1981), and very recently affirmed by that court in *In re Guardianship of Williams,* 254 Kan. 814, 869 P.2d 661 (1994).

This issue was not raised to the trial court. It is raised before this court for the first time on appeal. "Where constitutional grounds for reversal of a judgment are asserted for the first time on appeal, they are not properly before the appellate court for review." *In re D.D.P., Jr.,* 249 Kan. 529, Syl. ¶ 5, 819, P.2d 1212 (1991). There is an exception to the rule we have just quoted. When the constitutionality of a statute is at issue, it may be addressed for the first time on appeal if addressing that issue is necessary to determine the merits of the action or where the issues cannot be intelligently decided without doing so. *Gillespie v. Seymour,* 14 Kan. App. 2d 563, 575, 796 P.2d 1060 (1990). We conclude that we cannot intelligently decide the merits of this action without dealing with the claim that the portion of the statute cited above is unconstitutional.

The parental fitness doctrine to which D.G. refers has been the law of this state for some period of time. However, it was in *Sheppard* that the rule was truly defined and applied. The *Sheppard* case was a dispute between the mother of a minor child and her parents. The maternal grandparents were granted custody of the minor child. The mother filed a motion to change custody, and, in the ensuing litigation, the trial court determined that it was in the best interests of the child that he remain with the

maternal grandparents. The mother appealed. The Supreme Court reversed and, in so doing, said:

> "It is clear under our decisions and those of the United States Supreme Court that a natural parent's right to the custody of his or her children is a fundamental right which may not be disturbed by the State or by third persons, absent a showing that the natural parent is unfit. As we noted in *In re Cooper,* 230 Kan. 57, 631 P.2d 632 (1981), a parent's right to the custody, care, and control of his or her child is a fundamental liberty right protected by the Fourteenth Amendment of the Constitution of the United States.
>
> "The statute under consideration [K.S.A. 1980 Supp. 60-1610(b)(2)] takes away that right. Fitness of a parent is no longer the criterion. If the trial court determines that the best interests of the child will be served by placing it with third persons, the court may do so. The parent need not consent, and he or she may be perfectly fit, willing, and able to care for and raise the child. No exceptional circumstances need exist.
>
> "The exact objective of the legislature is not clear. The act provides an expeditious method of awarding custody, despite the existence of fit parents, to persons who have had temporary custody of the child with the consent of a divorced parent. It reaches only the children of divorced parents, not those of separated or unwed parents. The statute does not appear necessary in order to further the State's interest in the protection of children, for we have the juvenile code provisions to protect neglected children, and provisions in the civil code to provide

for changes in custody and support, and for the removal of children from unfit parents. See K.S.A. 1980 Supp. 38-824, K.S.A. 1980 Supp. 38-1301 *et seq.*, and K.S.A. 1980 Supp. 60-1610(*a*) and (*b*)(1).

"Catherine Sheppard appeared before the trial court opposing the motion of her parents and seeking to retain custody of her son. The trial court made a specific finding, upon conflicting evidence which we need not detail here, that Catherine Sheppard was not an unfit parent. Under the authorities cited above, she has a fundamental right, protected by the Due Process Clause of the Fourteenth Amendment, to the custody of her child, as opposed to all third parties. She cannot be denied that right for the sole reason that a court determines and concludes that someone other than a natural parent might do a better job of raising the child, thus furthering his 'best interests.' " *Sheppard*, 230 Kan. at 152-53.

The court then went on to state its holding:

"What we hold here is simply this: that a parent who is not found to be unfit, has a fundamental right, protected by the Due Process Clause of the United States Constitution, to the care, custody and control of his or her child, and that the right of such a parent to custody of the child cannot be taken away in favor of a third person, absent a finding of unfitness on the part of the parent. We hold that K.S.A. 1980 Supp. 60-1610(*b*)(2), which destroys that fundamental right, is violative of the Due Process Clause and therefore unconstitutional." 230 Kan. at 154.

This "parental fitness doctrine" was most recently reaffirmed by our Supreme Court in *In re Guardianship of Williams*, 254 Kan. 814. In the process, the court overruled a Court of Appeals decision in *In re Marriage of Criqui*, 14 Kan. App. 2d 672, 798 P.2d 69 (1990), in which we allowed the best interests of the child to be considered in a custody dispute between a natural parent and the child's grandparents.

At first glance, the argument made by D.G. appears to be compelling. The *Williams* and *Sheppard* decisions rather emphatically state that a parent must be proven unfit before being deprived of custody in a dispute with a nonparent. Do *Williams* and *Sheppard* control this decision? Must the parental preference doctrine be employed in every instance involving disputes between natural parents and third parties? The answer to these questions is a qualified "No." The parental preference doctrine is generally employed in cases where the issue is one of custody between a parent and a nonparent in a divorce or domestic relations setting. The courts have applied other rules in adoption proceedings where the issue is whether the consent of a natural parent is required. The rules which apply to cases of that nature are generally statutory in origin. The constitutionality of those rules has been dealt with by the Supreme Court of the United States and of the State of Kansas. In *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), the court held that an Illinois statute, which automatically made illegitimate children wards of the State upon the mother's death, violated both the equal protection and due process clauses of the United States Constitution. Factually, *Stanley*, was a case in which the unwed father had lived with

and supported the children all of their lives. Under those facts, the court held that the father was entitled to notice and a hearing to determine his fitness as a parent before destroying his custodial relationship with his children.

In *Quilloin v. Walcott,* 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549, *reh. denied* 435 U.S. 918 (1978), the court examined a Georgia statute which allowed the adoption of an illegitimate child over the natural father's objection. The facts in that case indicated that the stepfather had petitioned to adopt his wife's 12-year-old illegitimate child. The natural father of that child had never had custody of the child and had assumed only minimal responsibilities for the welfare and support of the child. When the natural father learned of the pending adoption, he sought to prevent it. He also sought visitation rights and filed a petition for legitimation. The Supreme Court held that a "best interests of the child" hearing, which requires less proof than a "fitness" hearing, satisfied the natural father's due process rights under the facts.

In *Caban v. Mohammed,* 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760 (1979), the United States Supreme Court held a New York statute unconstitutional. The statute, similar to a statute in Kansas, required the consent of an unwed mother for the adoption of her child but not that of the unwed father. The statute was stricken as an unconstitutional violation of the gender-based prohibition against denial of equal protection of the law.

Again, the facts of *Caban* are instructive. Caban had lived with Maria out of wedlock for several years. During the period of time the two cohabited, two children were

born. Caban was the acknowledged father and contributed to the support of these children over the years. After he and Maria separated and she married Mohammed, Caban continued to maintain close contact with the children. Throughout the years, Caban continuously maintained a close, familial relationship with the children. Maria's new husband attempted to adopt the children under a statute which required her consent but not the consent of the unwed father. In a five-to-four decision, the Court held the New York statute unconstitutional. However, the language in the opinion appears to limit the operation of the decision. The court in *Caban* indicated that a different result might be reached in a situation where an infant was involved as opposed to an older child. The court also intimated that a different result might be reached in a case where, factually, the natural father had never come forward to participate in the rearing of the child. *Caban*, it appeared, was limited to the facts shown.

The Kansas Supreme Court first dealt with these issues in *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982). In that case, the natural father of an illegitimate child challenged the constitutionality of K.S.A. 59-2102(2) (repealed L. 1990, ch. 145, § 38) for the reason that the statute required the consent of the mother of an illegitimate child for adoption but not the consent of the unwed father. The Supreme Court, in a carefully reasoned opinion, held that under the facts shown the statute did not violate the constitution.

> "With the foregoing principles in mind it is obvious that K.S.A. 59-2102(2) is not unconstitutional in all adoption cases involving an unwed

father. The extremes involving application of the statute would be (1) where the father is unknown or the child is the result of rape, it is obvious that consent would not be required; and (2) in a case such as *Caban* where the children were several years old, the father had established a close-knit familial relationship with the children and their mother and had supported and nurtured them for years, consent would be necessary. Is there a middle ground in which K.S.A. 59-2102(2) is constitutional based upon the facts of the case? We think so. In *Caban* the Supreme Court indicated that the adoption of an illegitimate infant or one whose father had failed to come forth and provide support would probably not require consent so long as the safeguards of *Stanley* and *Quilloin* were observed. . . .

"Appellants contend that the appellees should have first prevailed upon the mother to bring relinquishment proceedings under K.S.A. 38-113a. Such proceedings are not a part of the adoption statutes and while they have no application to the facts before us, the statute is indicative of the legislative intent involving illegitimate children and reveals certain factual situations which are pertinent to our discussion. The statute provides that the mother of an illegitimate child may relinquish her child for adoption pursuant to K.S.A. 38[-113a] without the consent of the father when:

> '(1) The father abandoned or neglected the child after having knowledge of the child's birth;
>
> '(2) the father is unfit as a parent;

> '(3) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;
>
> '(4) *the father failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;*
>
> '(5) *the father abandoned the mother after having knowledge of the pregnancy;* or
>
> '(6) the birth of the illegitimate child was the result of rape of the mother.'
>
> "While we do not consider such factual situations to be exclusive, *we believe they are descriptive of situations where, applying the requirements of* Caban, *the adoption of an illegitimate child without the father's consent pursuant to K.S.A. 59-2102(2) would not be unconstitutional."* 231 Kan. at 223-24. (Emphasis added.)

We recognize that the portion of the opinion quoted above is, in all probability, nothing more than dicta. K.S.A. 38-113a (Ensley 1981) (repealed L. 1985, ch. 114, § 30) was not an issue in *In re Adoption of Baby Boy L.* Despite that fact, we find the reasoning of the Supreme Court logical and persuasive. There is every reason for protecting the rights of a father to children, illegitimate or not, whom he has reared, loved, and supported. This is the true parental right which we protect, and it involves not only the individual rights of the father but the broader concept of family, which is also entitled to protection. By the same token, where the father's "right" is purely biological and there has been no family formed, no bonding, no support, and no love, that right seems to be obviously less deserving of support. Those instances

specified under K.S.A. 38-113a and K.S.A. 1993 Supp. 59-2136(h)(1)-(7) in which consent may be declared unnecessary are examples of situations in which the right of a natural father is little more than biological. We hold that the Constitution does not prohibit dispensing with a father's consent when the factual situations shown in 59-2136(h)(1)-(7) are shown to exist and the father's due process rights to litigate those issues has [sic] also been protected.

The extent to which a true parent-child relationship affects this issue is further shown in *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983). The natural father in that case argued that his due process rights were violated because he was not given notice of the adoption proceeding. New York law required that notice be given only to those putative fathers who have field their names with a putative father registry; the natural father had not done so. It was undisputed that he had never had any significant custodial, personal, or financial relationship with his child, and he did not seek to establish a legal tie with her until she was two years old.

The Supreme Court of the United States upheld the New York statute as constitutional, indicating:

> "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child' [citation omitted], his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' [Citation

omitted.] *But the mere existence of a biological link does not merit equivalent constitutional protection. . . .*

"The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." (Emphasis added.) 463 U.S. at 261-62.

The decision in *Stanley, Quilloin, Caban, Baby Boy L.,* and *Lehr* indicate that the degree of protection afforded parental rights under the Due Process Clause depends upon the extent and nature of the parent-child relationship. In the instant matter, it is undisputed that the father did not support the mother for six months prior to the birth of the child and that there is no developed parent-child relationship between D.G. and Baby Boy N. This case does not concern termination of a fully developed parent-child relationship. Under those circumstances, we conclude that K.S.A. 1993 Supp. 59-2136(h)(4) and (5) are not unconstitutional under the facts shown.

We next turn to the question of whether the statute in question provides due process protection of a father's rights. We conclude that it does. K.S.A. 1993 Supp. 59-2136(h) provides the father with notice and an opportunity to be heard and appointed counsel to represent

him if necessary. In addition, his consent will be required unless one of the seven situations in K.S.A. 1993 Supp. 59-2136(h) is proven by clear and convincing evidence. We believe that where a trial court finds that a father's reasonable efforts to provide for his child's welfare failed because of interference by the mother, adoption agency, or adoptive parents, the statute should not operate to terminate his parental rights.

There can be no equal protection claim. K.S.A. 1993 Supp. 59-2136, by its own terms, applies to the mother as well as to the father where possible.

What about the parental preference issue? Can that doctrine, as enunciated in *Sheppard* and *Williams*, be reconciled to the adoption statutes which permit a natural parent's consent to be dispensed with for reasons other than unfitness? We believe that it can. We would limit *Sheppard* and *Williams* to those cases where a statutory scheme such as 59-2136(h) does not apply. As construed by the courts, statutes such as 59-2136(h) incorporate the parental preference doctrine by their protection of due process rights and the "clear and convincing" burden of proof required to terminate the rights of natural parents. In cases such as this, the rights of a natural parent are properly protected, and the "parental preference" doctrine is preempted.

The parental preference doctrine is nothing more than a rule of law designed to protect the constitutional due process rights of a natural parent to the custody of his or her children. The protections incorporated within K.S.A. 1993 Supp. 59-2136(h) provide the same, if not better, protection of a parent's constitutional rights. For

this reason, the parental preference doctrine need not be employed where the same or similar protections are provided by statute. It is true that, in this case, D.G. was not found to be unfit, but his rights were terminated for reasons equally constitutional and under circumstances equally protective of his constitutional rights as the parental preference doctrine. For these reasons, we conclude that K.S.A. 1993 Supp. 59-2136(h) is not an unconstitutional intrusion upon, or abrogation of, the parental preference doctrine.

DID THE TRIAL COURT ERR IN TERMINATING D.G.'S PARENTAL RIGHTS?

D.G. next argues that the trial court erred in finding that: (a) he failed without reasonable cause to provide support for T.M.N. during the six months prior to the child's birth; and (b) he abandoned T.M.N. after having knowledge of her pregnancy.

Our standard of review on this issue is whether the trial court's findings were supported by substantial competent evidence:

> "When findings of fact are attacked for insufficiency of evidence or as being contrary to the evidence, the duty of the appellate court extends only to a search of the record to determine whether substantial competent evidence exists to support the findings. An appellate court will not weight the evidence or pass upon the credibility of the witnesses. Under these circumstances, the reviewing court must review the evidence in the light most favorable to the party prevailing below."

> "In a determination under K.S.A. 1986 Supp. 59-2102(a)(3) of whether consent of a parent to an adoption is unnecessary for failure to assume parental duties, the best interests of the child is not a controlling factor in the decision."
>
> "In making a determination pursuant to K.S.A. 1986 Supp. 59-2102(a)(3), the fitness of the nonconsenting parent is not a controlling factor as it would be under proceedings pursuant to K.S.A. 38-1581 *et seq.*"
>
> "Generally speaking, adoption statutes are strictly construed in favor of maintaining the rights of natural parents in those cases where it is claimed that, by reason of a parent's failure to fulfill parental obligations as prescribed by statute, consent to the adoption is not required."
>
> "In making a determination in an adoption proceeding of whether a nonconsenting parent has failed to assume his or her parental duties for two consecutive years, all the surrounding circumstances must be considered." *In re Adoption of F.A.R.*, 242 Kan. 231, Syl. ¶¶ 2-6, 747 P.2d 145 (1987).

In *In re Adoption of Baby Boy S.*, 16 Kan. App. 2d 311, 313, 822 P.2d 76 (1991), we held that the determination of whether a father had failed without reasonable cause to provide support for the mother during the six months prior to the child's birth was

> "analogous to cases where the trial court must determine if a parent has failed or refused to assume the duties of a parent for two consecutive years prior to an adoption pursuant to K.S.A. 1990 Supp. 59-2136(h)(7) (repealing and replacing K.S.A. 1989 Supp. 59-2102[a][3]). The

> tests and rules applicable in those instances are equally applicable when a trial court must determine whether a father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth."

When determining whether a nonconsenting father has failed without reasonable cause to provide support for the mother during the last six months of pregnancy, all the relevant surrounding circumstances must be considered. *In re Adoption of Baby Boy S.*, 16 Kan. App. 2d at 312. These circumstances may include the father's conduct more than six months before the birth of the baby. 16 Kan. App. 2d 311, Syl. ¶ 3.

In the instant matter, it is undisputed that D.G. provided no support, financial or otherwise, to T.M.N. in the six months before she gave birth. Moreover, T.M.N. testified that she had no contact with D.G. between June 3, 1992, and November 7, 1991. We note that D.G. disputes T.M.N.'s testimony in this regard and testified that he spoke to her twice during that time frame.

We need not concern ourselves in this case with what constitutes support. That was adequately defined in *In re Adoption of McMullen*, 236 Kan. 348, 691 P.2d 17 (1984). Here, however, no support was provided. The only issue which the trial court was required to determine was whether D.G. failed to provide the support without reasonable cause.

D.G. argues that his failure to provide support should be excused on several grounds. First, T.M.N. wrote him a letter in which she stated she would disappear if he did not consent to the adoption. He argues that,

after he received that letter, he feared that if he contacted T.M.N., she would disappear with his child. Despite this testimony, D.G. also testified that he went immediately to her home after he received the letter and discussed the matter with her extensively. He also testified that T.M.N. asked him to seek counseling with her, but that he declined to do so. The trial court found it significant that T.M.N. never indicated that she would refuse D.G.'s support. Indeed, the letter sought only his consent to the adoption. We conclude that substantial competent evidence supports the trial court's decision that this letter did not reasonably excuse D.G.'s failure to provide support.

D.G. next argues that he called the Wichita Legal Services to ask what legal steps could be taken to prevent the adoption of the child. He testified that an employee there told him that there was nothing he could do until the child was born. He seeks to justify his failure to provide support on the basis of the advice given him by the Wichita Legal Services. The trial court rejected this excuse. The court held that the mere fact that D.G. could do nothing to prevent the adoption of the child prior to its birth did not constitute a reasonable excuse for his failure to provide support. We hold that this finding is supported by substantial competent evidence.

Finally, D.G. argues that he was not required to provide support to T.M.N. because she did not require any support. It is possible that the mother's needs and requirements are a relevant circumstance in determining whether a natural father acted reasonably in failing to provide her with support. In this case, however, the argument is irrelevant. D.G. cannot rely on this argument

because substantial competent evidence indicates that he never inquired about the needs of T.M.N. nor offered her any support in the six months prior to her giving birth. It seems obvious to us that since he did not know whether she needed support, he cannot now claim that this was a reasonable cause of his failure to provide support.

Finally, we turn to the trial court's conclusion that D.G. abandoned T.M.N. after having knowledge of her pregnancy. We have pointed out that, according to T.M.N.'s testimony, she had no contact at all with D.G. for a period of five months preceding the birth of the child. Although this testimony was controverted by D.G., the trial court, as the finder of fact, was required to determine which version it believed. The trial court chose to believe the testimony of T.M.N. This testimony provides substantial competent evidence that D.G. terminated his relationship with T.M.N. and withdrew his support from her after learning of her pregnancy. In our judgment, this evidence is sufficient to support a finding that D.G. abandoned T.M.N.

We hold that the trial court's decision to terminate the parental rights of D.G. for the reasons stated in this opinion was supported by substantial competent evidence.

DID THE TRIAL COURT HAVE JURISDICTION TO ENTER THE DECREE OF ADOPTION?

D.G., finally, argues that the trial court had no jurisdiction to enter the adoption decree in this case after D.G. had appealed the order terminating his parental rights.

We agree with D.G. and vacated the adoption decree entered in the instant matter.

Adoption is a procedure governed by the probate code as set out in Chapter 59 of the Kansas Statutes Annotated. As such, it is subject to the provisions of K.S.A. 59-2407, which provides:

> "An appeal from an order admitting a will to probate shall not suspend the operation of the order until the appeal is determined, but no distribution to heirs, devisees, or legatees shall be made pending the appeal. *In all other cases the appeal shall suspend the operation of the order, judgment, decree, or decision appealed from until the appeal is determined or the judge hearing such appeal shall otherwise order.*" (Emphasis added.)

The provisions of K.S.A. 59-2407 are clear and unambiguous. This case does not involve appeal of an order admitting a will to probate. By virtue of 59-2407, operation of the order terminating D.G.'s parental rights was suspended as soon as he filed a notice of appeal from that order. The effect of that suspension was to leave the situation the same as if the order terminating parental rights had never been entered. Thus, the adoption decree was entered without D.G.'s consent and without an operative decision dispensing with his consent. The trial court was without jurisdiction to grant the adoption without either the consent of D.G. or an operative order determining that his consent was not necessary. See *In re Adoption of Harrington*, 228 Kan. 636, 639-40, 620 P.2d 315 (1980).

Under the circumstances, we have no choice but to vacate the decree of adoption and remand the matter for

a new hearing on the issue of adoption. We have determined, in this opinion, that the consent of D.G. to the adoption is not required by affirming the decision terminating his parental rights. D.G., as a consequence, will not be a factor in proceedings to finalize this adoption after our mandate has been filed in the instant matter. We would, therefore, expect that adoption proceedings which take place after the mandate is spread of record to be somewhat more perfunctory than the ones which give rise to this appeal.

We realize that setting aside an adoption decree is an extreme decision and is fraught with possible consequences; however, we have no choice but to do so in the instant matter. We suggest that the legislature might very well consider whether to alter the impact of K.S.A. 59-2407 on proceedings of this nature. However, the impact a reversal of an order terminating parental rights will have on a decree of adoption granted after that order was appealed from must be considered.

Judgment terminating parental rights of natural father is affirmed, judgment of adoption is vacated, and the matter is remanded for a new trial on the issue of adoption.

MARTIN, PRINGLE, OLIVER, WALLACE & SWARTZ
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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

In the Interest of: Baby Boy Neises Born: November 7, 1992	)))))	Case No. 92 A 322 (Filed March 26, 1993)

JOURNAL ENTRY TERMINATING PARENTAL RIGHTS OF DAVID LAWRENCE GALLEGOS

The Court, having heard the evidence and having taken into consideration the trial briefs, the proposed findings of fact and conclusions of law and the argument of counsel, makes the following findings of fact and conclusions of law in deciding that the petition to terminate the parental rights of David Lawrence Gallegos should be granted and said rights terminated.

FINDINGS OF FACT

1. Baby Boy Neises was born on November 7, 1992 in Wichita, Sedgwick County, Kansas.

2. Tinna Maria Neises is the child's natural mother and one of the petitioners in this action.

3. The natural father of the child is David Lawrence Gallegos.

4. The natural father and natural mother had dated since the summer of 1991.

5. The natural father had previously been married. His former wife had two children who were not infants when the couple was married. The natural father has not had any experience raising an infant child.

6. In November, 1991, the natural father asked the natural mother to open a bank account in her name in which he could deposit and then withdraw his money. He wanted to avoid claims against his money by his creditors or those creditors of his former wife. The natural mother opened an account at the Catholic Family Federal Credit Union solely with funds received from the natural father. See Ex. 1 & 2.

7. The natural mother had made the natural father aware that she did not want children and that she did not love him and, therefore, did not want to marry him. However, neither parent used contraceptives when engaging in sexual intercourse.

8. The natural mother confirmed she was pregnant on March 2, 1992. She told the natural father of the pregnancy on that day.

9. She indicated immediately that she wanted to place the baby for adoption. The natural father indicated he was opposed to an adoption and was willing to take custody of the child. This conflict was aggravated when the natural father made the natural mother feel he intended to get her pregnant despite her opposition to

children and later offended her by questioning if someone else was the father. The natural father was an admitted alcoholic and prior drug user. The natural mother was concerned that he would relapse, particularly in the area of drinking, due to the stress of raising a child as a single parent. She was also opposed to his plan to pass the child around to his mother, ex-wife, and his friends as babysitters as he had to work to support the child.

10. The natural father last deposited funds in the bank account opened for his benefit on April 16, 1992. The only funds in the account were funds provided by the natural father. Although gainfully employed, the natural father never offered the funds to the natural mother as a means of providing her financial support. He withdrew all but $55.00 from the account on May 5, 1992, after he had knowledge of the pregnancy. He used the funds for personal use such as participating in a pool tournament. None of the withdrawn funds were offered to the natural mother nor did she ever understand that the funds remaining in the account were available for her use. She treated the funds as belonging to the natural father, and the funds still remain in the account.

11. The natural father, after having knowledge of the pregnancy failed, without reasonable cause, to provide support for the mother during the six months prior to the child's birth based upon the following facts:

(a) The natural father paid no form of financial support to the natural mother at any time, particularly during the six-month period prior to the child's birth. There is no evidence that he physically attempted to give her money or that she ever refused any such offer.

(b) The natural father did not specifically or physically attempt to offer any financial assistance to the natural mother. While he claims to have asked her generally if she needed anything, she never recalls him making such an inquiry.

(c) The natural father never offered to provide or pay for maternity clothes or make arrangements for paying the medical bills. Although he wanted to have custody of the child, he saved no significant funds nor did he make alternate arrangements to be able to pay for the medical bills even though he knew the natural mother had no maternity insurance coverage.

(d) The natural mother asked the natural father to go to counseling in an attempt to resolve the conflict over placing the child for adoption. The natural father failed to take advantage of this proposal.

(e) The natural father abruptly ended the relationship on April 20, 1992. (See diary entry, Ex. 8). Any contacts after this date were merely incidental contacts that were not supportive of the natural mother but were solely to advance or protect the natural father's objectives.

(f) The natural father seems to rely on five factors as evidence that he had reasonable cause not to support the natural mother.

(1) The natural father decided he was not getting enough attention from the natural mother due to their conflict over placing the baby for adoption. This does not justify his failure to support her emotionally during the pregnancy.

(2) The natural father testified he made general inquiries of the natural mother about whether she needed anything and she said no. This was denied by the natural mother and, even if they occurred, were not specific enough to establish "reasonable cause" to fail in his obligation to support the natural mother during the pregnancy.

(3) He relies on a letter (Ex. 7) from the natural mother he received and discussed with her on June 3, 1992, as creating the concern that she would run away if he supported or offered to support her financially, emotionally, physically or through communications. The letter is limited to the issue of signing a consent and does not indicate in any way that the natural mother would decline his financial, emotional or communicative support. The clear evidence is that the mother did not and would not have declined any of these forms of support from the natural father.

(4) He called Wichita Legal Services to seek legal advice about what legal action he could take to prevent the natural mother from placing the baby for adoption. He was told by the intake clerk, who is not a lawyer, that there was nothing he could legally do until the baby was born. The question was only in the context of legal action available before the child's birth. The intake clerk never told him not to support the natural mother. The limited inquiry and response did not warrant the failure to support the mother financially, emotionally or through communications.

(5) The natural father cannot rely on the expectation that the natural mother's parents

with whom she was living would provide support since the natural father's duty to support is primary and involves aspects of support only he could have provided.

12. The father abandoned the natural mother after having knowledge of the pregnancy based upon the following factors:

(a) The father abruptly broke off the relationship with the natural mother even though she still wanted his support and comfort during the pregnancy.

(b) The father failed to support her, financially, emotionally, physically or through communications.

(c) The natural father's actions were taken to advance his own motives and interests and to seek custody of the child but this meant he decided he would have little or no contact with the mother.

(d) The father failed to pursue the possibility of counseling with the natural mother.

(e) The natural father's absence from the natural mother's life meant he lost the chance to see if his continued support and presence may have convinced the natural mother to retain custody of the child or reconsider an offer to marry him.

(f) While the natural father described two incidents of contact with the natural mother in August and September of 1992, the clear and convincing evidence establishes that these contacts were, at best, incidental, only intended to advance the natural father's own interests, and probably occurred either in early May 1992 or after the birth of the child, leaving a period from June 3,

1992 to November 7, 1992 without any contact with the natural mother.

(g) The natural father's intent was to advance his own interests and objectives and by these acts, he evidenced his intent to abandon the natural mother.

(h) The natural mother clearly felt abandoned as evidenced by her diary entries of August 11, 1992 where she indicated "I still care about him. He hasn't called in ages. Oh well, he must not care to (sic) much cuz he knows I wouldn't leave anyway." On November 7, 1992, immediately after the delivery, she indicated in her diary, "I wish it was Dave with me instead of Ferlin but Ferlin has been the one always there for me."

13. Petitioners failed to establish by clear and convincing evidence that the natural father (respondent) is unfit as a parent.

14. The natural mother did not disclose the identity or whereabouts of the natural father in an effort to place the child for adoption as she thought an adoption with the couple she selected was in the best interests of the child. She signed the first relinquishment (Ex. 11) and related affidavit (Ex. 12) failing to disclose this information. For this reason, the previous order terminating the natural father's parental rights has been set aside and the natural father now has been provided a full opportunity to be heard on the issue of terminating his parental rights.

15. Catholic Social Services, Inc. did not formally accept in writing the relinquishment of the natural mother's rights to the child. The child is in the physical

custody of Catholic Social Service, Inc. through its agent the foster parents and prospective adoptive parents. The natural mother has executed a second relinquishment which is qualified to the extent that if the natural father's rights are not terminated, she wants custody of the child to revert to her. Catholic Social Service, Inc. is willing for such reversion to occur.

16. Any findings of fact deemed conclusions of law are hereby incorporated by reference into said conclusions of law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the issues presented herein. Both the natural mother and Catholic Social Service, Inc., as the agency with custody of the child, have standing to petition the Court to sever the natural father's parental rights under K.S.A. § 59-2136(e).

2. Venue is properly laid in this Court.

3. A natural parent's rights may be severed by an order of the Court upon a showing by clear and convincing evidence that one or more of the circumstances enumerated under K.S.A. § 59-2136(h) has been established.

4. In making the determination of whether the natural father's rights can be terminated in the face of allegations that he has either abandoned the mother or failed to provide support, the Court must determine whether he has pursued the opportunities and options which were available to carry out such duties to the best of his ability. In re *Adoption of F.A.R.*, 242 Kan. 231, 747 P.2d 145 (1987).

All the surrounding circumstances must be considered. In re *Adoption of Baby Boy S*, 16 Kan. App.2d 311, 822 P.2d 76 (1991).

5. When addressing K.S.A. § 59-2136(h)(7) regarding the failure without reasonable cause to provide support for the six months prior to delivery, the Court's consideration is analogous to the process for deciding whether to terminate a parent's rights for failing or refusing to assume the duties of a parent for two consecutive years involving an older child. In re *Adoption of Baby Boy S*, 16 Kan. App.2d 311, 822 P.2d 76 (1991). On the abandonment issue, a finding of total and complete abandonment is not required to terminate parental rights. In re *Adoption of McMullen*, 236 Kan. 348, 691 P.2d 17 (1984).

6. Under both provisions, the Court may disregard incidental visitations, contacts, communications or contributions. In re *Adoption of Baby Boy S., supra.* The case of In re *Adoption of McMullen*, 236 Kan. 348, 691 P.2d 17 (1984), defined "incidental" in this context as casual, of minor importance, insignificant or of little consequence. Such contacts may be disregarded. In re *Adoption of B.C.S.*, 245 Kan. 182, 777 P.2d 776 (1989).

7. On the issue of abandonment of the mother, the focus must be upon whether the natural father's conduct left the natural mother without emotional, physical, or financial support or without significant communication or contacts. The statute, K.S.A. § 59-2136(h)(5) refers only to abandonment of the mother, not the child, once the natural father had knowledge of the pregnancy. While in this case the natural father opposed the adoption and

wanted custody of the child, his conduct clearly evidences an abandonment of the mother. The natural father provided no financial support after he became aware of the pregnancy, provided no emotional or physical support to her after April 20, 1992, and at best, had only incidental contacts with her after April 20, 1992. His objectives were all self serving and not intended in any manner to be supportive of the natural mother while still reserving his preference that the child not be placed for adoption. The mother clearly was interested in having the natural father involved in her life during the pregnancy as evidenced by her interest in seeking joint counseling and never refusing to have contact with him even after she delivered her letter (Ex. 7) to the natural father. The two talked twice after the delivery of the letter. The last conversation on June 8, 1992, involved the natural mother agreeing to see the natural father later in the evening, but the natural father failed to appear or to call to explain his failure to appear. The Court rejects the testimony of contacts after June 8, 1992, and before November 7, 1992, because they more likely occurred either prior to June 8, 1992, (relating to Ted's injured foot in May) or after the birth of the child (the disclosure in December about the natural father's relapse to drinking) or as merely being incidental since the natural father could not remember when they occurred and the natural mother and her family deny any such contact by the natural father. In addition, Wichita Legal Services never advised the father to abandon the natural mother until the child was born. Total abandonment is not required to terminate parental rights but total or near-total abandonment of the mother

occurred in this case. The natural father abandoned the natural mother after having knowledge of the pregnancy.

8. The natural father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth. The Court must examine the natural father's activities from May 7 to November 7, 1992. During this period, the natural father did not provide financial support of any kind to the mother. As indicated above, he also did not provide any form of emotional or physical support, and the limited communications and contacts were neither supportive nor significant and, therefore, are deemed incidental contacts which will be disregarded by the Court.

9. The natural father admitted that he did not financially, emotionally, physically or by communications or contacts, support the mother during the six months prior to the delivery. He argues, however, that he had "reasonable cause" not to fulfill his duties to the natural mother as the admitted natural father. The Court concludes that the causes identified by the natural father are not legally nor factually sufficient to justify the lack of support during the critical six month period.

First, the natural mother's letter delivered June 3, 1992, never declined the natural father's financial support, emotional or physical support or continued communications. The natural mother wanted all of this from the natural father but concluded he did not care. There is no evidence the natural mother was specifically asked or ever declined financial or emotional support from the natural father.

Second, it was not "reasonable cause" justifying the lack of support that the natural mother was living with her parents. The emotional, physical and financial support contemplated by the statute should come from the natural father. His duty as a natural father including one of providing financial support is not eliminated even though the natural mother was living at home.

Third, the contact with Wichita Legal Services was focused on the available legal remedies to prevent the adoption. The natural father never asked about support, and the intake officer never discussed not supporting or abandoning the natural mother. No further inquiry was made to explore what steps the natural father could take to preserve his parental rights. This contact with Wichita Legal Services does not constitute "reasonable cause" justifying the lack of support of the natural mother.

Finally, the natural father testified that he asked if there was anything the natural mother needed and she either did not respond or said "no." The natural mother denies ever being asked this question. There is no evidence the natural father attempted to physically give the natural mother money, maternity clothes or anything of value which was then refused. The unsubstantiated claim of the offer or rejection, without proof of actual tenders and refusals thereof, is not sufficient to establish "reasonable cause" justifying the lack of support.

10. Petitioners have failed to establish by clear and convincing evidence that the natural father (respondent) is unfit within the meaning of K.S.A. § 59-2136(h)(2).

11. Based on the foregoing, the Court has determined the natural father did not pursue the opportunities

and options which were available to him to carry out his duties as natural father to the best of his ability. In re *Adoption of F.A.R.*, 242 Kan 231, 747 P.2d 145 (1987). The Court is not satisfied that the father made significant efforts to support the natural mother. The Court is satisfied the natural father abandoned the natural mother. What contacts were alleged are found to have been incidental and therefore can be disregarded.

12. Petitioners have sustained their burden of proof on the issues of failing to support without reasonable cause and abandonment.

13. Even if the petitioners had not sustained their burden of proof, the court would have found that custody should revert to the natural mother. Neither relinquishment fulfills the requirements of the adoption statutes until accepted in writing by the agency and, therefore, the natural mother's rights have not been legally relinquished.

14. The Court finds that the parental rights of David Lawrence Gallegos to Baby Boy Neises should be terminated in accordance with K.S.A. 59-2136(e) and (h), and that upon the acceptance of the natural mother's relinquishment by Catholic Social Service, Inc., Baby Boy Neises may be placed for adoption without the consent of or notice of hearing given to David Lawrence Gallegos.

15. Any of the foregoing conclusions of law deemed findings of fact are hereby incorporated into the findings of fact.

IT IS THEREFORE ORDERED that the foregoing findings of fact and conclusions of law be and are hereby adopted by the Court.

IT IS FURTHER ORDERED that petitioners' petition be and is hereby granted.

IT IS FURTHER ORDERED that the parental rights of David Lawrence Gallegos in Baby Boy Neises be and are hereby terminated in accordance with K.S.A. § 59-2136(h)(4) and (5) and said child may be placed for adoption without the consent of or notice of hearing being given to David Lawrence Gallegos.

IT IS SO ORDERED.

/s/ Hal Malone
HAL MALONE
DISTRICT COURT JUDGE

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